A Proposal for Transparency and Accountability in Corporate Political Spending

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A New Deal For This New Century: Making Our Economy Work For All
Conference Draft – September 2019

Abstract

Citizens United empowered corporations to spend unlimited amounts on independent political expenditures. Nearly a decade has passed since the Supreme Court's ruling, and corporate and securities laws have not been updated to provide shareholders with information and to include them in the process of creating corporate speech or otherwise establish protection against abuses and expressive harms. Existing laws and voluntary practices by corporations do not fit the Court's assumptions that shareholders would be able to inform themselves about corporate political spending and take meaningful action if they disapprove and do not want to associate with such speech.

This paper reviews the notable proposals that policymakers, academics, and others have made since *Citizens United* and distills two key ideas for adoption: (1) SEC-mandated disclosure of political spending by public corporations; and (2) legislation requiring public corporations to obtain shareholder approval for corporate political spending and allowing for binding shareholder resolutions on this subject matter. Although wide-ranging proposals have been made, including bold calls for a constitutional amendment, this paper focuses on the more modest issues relating to corporate governance. Mandating disclosure and shareholder approval would increase transparency and accountability and move corporate governance closer in line to that envisioned by the Supreme Court.

Introduction

Next year will be the tenth anniversary of *Citizens United*—the Supreme Court's decision that allows corporations to spend unlimited amounts of money from the corporate treasury on independent political expenditures.[2] The decision was widely criticized at the time and remains so a decade later.[3] The disconnect between the Court's view of corporations and the reality on the ground has only grown with time. The Court envisioned corporations as "associations of citizens" who would have access to information about political spending,[4] but the reality is an increasingly polarized nation of individuals who have not associated in business corporations based on political

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[2] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

[3] A recent study from the University of Maryland and nonpartisan research group Voice of the People found that "[t]hree-fourths of survey respondents—including 66 percent of Republicans and 85 percent of Democrats—back a constitutional amendment outlawing *Citizens United*." Ashley Balcerzak, *Study: Most Americans Want to Kill* 'Citizens United' *with Constitutional Amendment*, PRI (May 10, 2018), https://www.pri.org/stories/2018-05-10/study-most-americans-want-kill-citizens-united-constitutional-amendment; *see also* Monica Youn, Citizens United: *The Aftermath, an Issue Brief for the American Constitutional Society*, BRENNAN CENTER FOR JUSTICE (June 8, 2010), https://www.brennancenter.org/analysis/citizens-united-aftermath-issue-brief-american-constitutional-society (noting that polls from Washington Post-ABC News, Common Cause, People for the American Way, and Pew Research Center found that the vast majority of poll respondents opposed the decision).

[4] *Citizens United*, 558 U.S. at 349, 370.

views and who are left in the dark about corporate money in our elections. Simply put, people do not typically invest for political reasons, do not have the ability to hold corporate directors and officers accountable, and corporate political spending is broadly unpopular among Americans of both parties.[5]

On a scale of national issues, Americans' concern about the erosion of public trust in government, institutions, and their fellow citizens is near the top of "very big" problems that Americans identify.[6] Poll respondents specifically cite concern about how corporations control the political process and how money corrupts it.[7] Bipartisan support exists to rebuild public trust, and investors and other stakeholders want information and accountability from corporations.[8]

This paper explains the problem, summarizes the range of proposals that have been made since *Citizens United*, and puts forward a two-part proposal that reflects the key ideas that have emerged and that polls show 80% or more of Americans support.[9] Specifically, the paper recommends that:

> (1) the SEC mandate public corporations to disclose corporate political spending, including expenditures made through intermediaries; and
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> (2) Congress enact legislation requiring public corporations to obtain shareholder approval for corporate political spending and allowing for binding shareholder resolutions on this subject matter.

Adopting this two-part proposal would increase transparency and accountability to shareholders.[10] It would provide a governance mechanism that involves shareholders in the process of creating corporate political speech and it would help investors and other stakeholders to make informed decisions about their investments and avoid abuse from corporate managers. Further, it would bring corporate governance closer in line with the assumptions the Supreme Court made in

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[5] *See* Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), https://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html.

[6] Lee Rainie & Andrew Perrin, *Key Findings About Americans' Declining Trust in Government and Each Other*, PEW RESEARCH CENTER (July 22, 2019), https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/.

[7] *Id.*

[8] *Id.*

[9] *New Poll: Americans Condemn High Levels of Corporate Political Spending, Overwhelmingly Support Strong Transparency and Accountability Reforms*, COMMON CAUSE (Jan. 30, 2014), https://www.citizen.org/news/new-poll-americans-condemn-high-levels-of-corporate-political-spending-overwhelmingly-support-strong-transparency-and-accountability-reforms/; Liz Kennedy, *Citizens Actually United, The Bi-Partisan Opposition to Corporate Political Spending and Support for Common Sense Reform*, DEMOS (Oct. 25, 2012), http://www.demos.org/sites/default/files/publications/CitizensActually United_CorporatePoliticalSpending.pdf; *New Mayday.US Poll: Voters of Every Political Stripe Agree on the Need for Fundamental Reform to the Campaign Finance System*, MAYDAY.US (Sept. 25, 2015), https://blog.mayday.us/post/129846704150/new-maydayus-poll-voters-of-every-political.

[10] This paper tracks current debate and frames the analysis in terms of shareholders as their interests were recognized as legitimate concerns in *Citizens United*, however this framing should not be read as equating shareholders with owners or suggesting that shareholders could not wish to pursue the interests of other stakeholders or that corporate law could not adjust to take account of stakeholder interests.

Citizens United and fit within constitutional constraints.[11] Notably, this proposal concerns the limited goal of improving the governance of public corporations and does not address broader goals concerning money in politics, but it would be a concrete step toward fostering a sustainable environment for corporations to responsibly pursue shared prosperity.

I. The Problem

The Supreme Court empowered corporations to make independent political expenditures based on assumptions that do not hold in the real world of investing and corporate governance.[12] In *Citizens United*, the Court assumed that shareholders could protect themselves "through the procedures of corporate democracy" from being compelled to fund corporate political speech.[13] Further, the Court assumed that shareholders would have access to information about the political spending of corporations, noting: "Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative."[14] The Court went on at length on this point, underscoring its assumption that the mechanism for holding corporations accountable was in working order:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are in the pocket of so-called moneyed interests.[15]

The idea that there was "little evidence of abuse that cannot be corrected by shareholders" was one of the main grounds on which the Court overturned precedent and the campaign finance provision at issue in *Citizens United*.[16]

Although it is possible to create procedures to protect shareholders and provide transparency, it is not the current state of the world; instead, investors in U.S. public corporations do not have protections against spending that they disagree with and they often do not have information to know about this activity in the first place.

It is helpful to briefly review principles of corporate law and existing patterns of stock ownership to better understand this dynamic and the nature of the problem.

Corporate law gives the board of directors authority to manage the business affairs of the corporation.[17] With most strategic and operational matters, this system works well and there is no

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[11] For a discussion of the constraints on regulation affecting corporate speech post-*Citizens United*, see Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 199-200 (2017); *see also infra* note 73.

[12] Douglas M. Spencer & Abby K. Wood, Citizens United*, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 318 (2014).

[13] *Citizens United*, 558 U.S. at 361-62 (quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978)).

[14] *Id.* at 370 (internal citation omitted).

[15] *Id.* (internal quotation marks omitted).

[16] *Id.* at 361-62.

[17] *See, e.g.*, Del. Code Ann. tit 8, § 141(a) (2018) (granting managerial authority for the corporation to the board of directors); 5 FLETCHER CYC. CORP. § 2096, The Paradigm of Centralized Management (2019) (explaining same as a general principle of state corporate law).

reason to believe that the interests of the directors and executives will diverge from those of shareholders or that the shareholders would have any particular expertise or expressive interest at stake. In some circumstances, such as fundamental changes to the corporation such as a merger or when the board determines executive compensation, there is the possibility for a divergence of interests or opportunism and corporate law provides for protections such as disclosure and a shareholder vote.[18] Absent special rules adopted by a particular corporation, there is no such protection in place regarding corporate political spending, however—it is treated as an ordinary business decision that is not subject to disclosure or a process which seeks shareholder input.[19]

This current state of the world is concerning because corporate leaders might be regularly using corporate funds to support political issues and candidates that shareholders oppose.[20] Such spending may reflect the directors' and officers' business judgment, but it is also potentially driven by their personal political preferences. There is no reason to believe that American investors want corporate directors and executives to serve as their political proxies in this way.[21] Even if the amounts being spent are relatively small for a particular corporation, such expenditures can reflect agency problems or pose risks to the firm.[22] Such expenditures can also influence elections, tilt the regulatory playing field in ways that harm shareholders as workers and citizens, and shareholders might have a strong interest in not supporting or associating with political speech they oppose.[23]

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[18] *See* 5 FLETCHER CYC. CORP. § 2105, Consent of Shareholders to Directors' Action—Necessity (2019) ("[T]here are numerous acts, which by statute or charter are made exceptions, and as to which consent is required, and acts of an extraordinary nature beyond the ordinary business affairs of the corporation must be done by or consented to by the shareholders because of their being outside the scope of the directors' powers. . . Sometimes, for the better protection of the shareholders, their assent, or the assent of a certain proportion of them, is expressly required by the charter or a general law to validate acts by the directors or trustees that, except for such requirement, would fall properly within their powers.").

[19] Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech Who Decides?*, 124 HARV. L. REV. 83, 83 (2010).

[20] *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 942-43 (2013).

[21] *See* Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 264 (1981) ("To permit corporate funds to be used to influence the exercise of government power forces a person seeking profits from market transactions, for which he must delegate decisionmaking power, to relinquish power to determine the extent and character of governmental compulsion on himself and the rest of society. It fractures his power to influence government decisions, on a range of issues—such as environmental or health and safety regulations, taxation, race relations, or the conduct of the nation's foreign affairs—that affect his welfare and that he may oppose. It also requires him to permit the use of his assets to support social views and generate social attitudes that may impinge upon his individual preferences.").

[22] Empirical research into the relationship between corporate political spending and firm value is mixed, and suffers from incomplete disclosures, but some studies find that political expenditures are associated with lower stock market returns and weak corporate governance. *See* Rajesh K. Aggarwal et al., *Corporate Political Donations: Investment or Agency?*, 14 BUS. & POL. 1 (2012); John C. Coates, IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9 J. EMPIRICAL LEGAL STUD. 657 (2012). For a critique that raises doubt about whether "a political spending disclosure requirement will deter self-serving political spending in a cost-effective manner," see Michael D. Guttentag, *On Requiring Public Companies to Disclose Political Spending*, 2014 COLUM. BUS. L. REV. 593, 654-55.

[23] Bebchuk & Jackson, *Shining Light*, *supra* note 20, at 943 (discussing the expressive interest of shareholders); Spencer & Wood, *supra* note 12, at 353 (explaining that the amount of spending varies widely by geography and the political office up for election); Lucian A. Bebchuk, Robert J. Jackson Jr., James D. Nelson, & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark* (forthcoming HARV. BUS. L. REV. 2020) at 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281791 (explaining that even if the amounts spent on politics were not by themselves monetarily significant, "they could be associated with risks to the firm and could reflect

Shareholders have few options in the "procedures of corporate democracy"—they could sell their stock, pursue a lawsuit against the corporate directors or officers in what is known as a derivative action, vote against directors or submit a proposal.

- **Selling stock** does not provide a meaningful remedy in these circumstances—it avoids for the shareholder only future instances in which the corporation spends general funds on political speech that she opposes; it does nothing to address the political spending that already occurred.[24] And, as explained below, many shareholders own stock indirectly through funds and cannot choose to sell a particular company's stock.

- **Derivative lawsuits** based on corporate political spending are also unlikely to provide relief or accountability. Unless the dissenting shareholder can make a case for fraud or breach of the duty of loyalty, which would require special facts that a shareholder is unlikely to have, it would be extremely rare to get to trial. Most notably, courts apply a highly deferential standard of review to ordinary business decisions by independent directors.[25] Even if a shareholder were to succeed in a derivative action, directors rarely pay damages out of their own pockets,[26] and the corporation likely cannot undo the corporate political expenditure.

- **Director elections** do not facilitate shareholder voice in the corporation's political spending or promote accountability with respect to this issue. The board generally has the power to nominate the slate of directors up for election. A "withhold" campaign against a director would not send a clear signal regarding corporate political spending. A proxy campaign to elect an opposing slate of directors would involve significant expense and effort—an unrealistic option for a dissenting shareholder and one that is ill-fitted to addressing the narrow issue of corporate political spending. Shareholders' implicit power to replace directors is relatively weak given the substantial impediments to actually doing so and therefore does not ensure that managers will act in the way that shareholders prefer.[27]

- **Shareholder proposals** are the most promising path for addressing corporate political spending and the most used to date, but have notably led to limited success and hold little

agency problems" and "could be viewed as material for many investors because of the expressive significance of such spending"); Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, Working paper (Nov. 29, 2018), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3038&context=faculty_scholarship (explaining that corporate political spending can tilt the regulatory process against workers, consumers, and citizens). Notably, not all shareholders will identify with the speech of the corporations they are invested in or otherwise believe an expressive interest or harm is at stake, but it is reasonable to understand that some portion of shareholders will. Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1029-30 (2011).

[24] Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009), http://yalelawjournal.org/forum/citizens-not-united-the-lack-of-stockholder-voluntariness-in-corporate-political-speech.

[25] *Id.* (explaining shareholders would have to make demand on the board or show futility and overcome the highly deferential business judgment rule, which is likely insurmountable as directors could potentially rationalize their decision as being in the interest of the corporation).

[26] Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1063-64 (2006).

[27] Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 852-56 (2005) (discussing the "substantial impediments" to shareholders "exercis[ing] their theoretical power to replace directors" and explaining that shareholders often "cannot secure rules-of-the-game decisions that would be value-increasing").

promise for broad-based, standardized reform on a system-wide basis. In public corporations, a shareholder that holds $2,000 worth of a company's voting shares for at least one year and meets certain procedural requirements can submit a proposal for shareholder vote.[28] Corporations often seek to exclude shareholder proposals from their proxy materials, however, or negotiate private deals with the proponents—a "process that plays out completely behind closed doors, with no notice to or participation by most shareholders, other corporate stakeholders, or the public."[29] These settlement agreements have led to disclosure standards at some companies, but they are "a mixed bag: effective at filling some gaps in public campaign finance disclosure law, but inadequate to make corporate electoral spending transparent in advance of elections."[30] Further, companies often fail to comply with settlement agreements on corporate political spending disclosure, and enforcement mechanisms are weak and impose the cost of monitoring and enforcement on the shareholder proponent.[31]

Shareholder proposals that do make it to a shareholder vote rarely receive majority support—the largest institutional investors have policies or practices against voting in favor of shareholder proposals involving corporate political spending.[32] As one commentator observed: "Although investors could theoretically lobby these funds to vote in [favor], investment-fund beneficiaries are likely to face the same collective-action problems vis-à-vis investment funds as shareholders are likely to face vis-à-vis traditional firms."[33] Although there was a significant spike in the number of shareholder proposals about corporate political spending and disclosure after *Citizens United*—evidencing investor interest in reform—the largest institutional investors did not support these proposals and they failed.[34] Even when shareholder proposals pass, they are generally not binding and corporate boards could decide not to implement them.[35]

After many years of shareholders attempting to use proposals to achieve increased transparency or accountability, they have achieved only limited progress and the result at many corporations has been "voluntary" disclosures that are piecemeal and incomplete. Company-by-company efforts come at a high cost that is imposed on only a subset of investors.[36] This is not an efficient way to establish disclosure at hundreds of public

[28] 17 C.F.R. § 240.14a-8 (2018).

[29] Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 266-68 (2016).

[30] *Id.* at 262, 265-66 ("More than one hundred such agreements exist, most with Standard and Poor's (S&P) 500 companies, although the precise number is difficult to determine due to the secrecy that pervades settlement.").

[31] *Id.* at 269.

[32] Strine, *Fiduciary Blind Spot*, *supra* note 23, at 18 ("For the last 5 years, Blackrock, Fidelity, and Vanguard supported almost no proposals to mandate that corporations disclose their political spending.").

[33] Reilly S. Steel, Comment, *Corporate Political Spending and the Size Effect*, 118 COLUM. L. REV. ONLINE 1, 6 (2017). In scholarly writing on the subject, the Chief Justice of the Delaware Supreme Court, Leo E. Strine, Jr., has termed this the "double legitimacy" problem—the "funds do not have legitimacy to speak for [their beneficiaries] politically" and "company management has no legitimacy to use corporate funds for political expression either." *Fiduciary Blind Spot*, *supra* note 23, at 1.

[34] *Id.* at 4 (documenting an uptick in the number of corporate political spending proposals from 2012-2016 followed by a decline).

[35] Bebchuk, *supra* note 27, at 852-56; Haan, *supra* note 29, at 273.

[36] Haan, *supra* note 29, at 271.

companies. Some corporations will never voluntarily adopt governance reforms and those that do will produce different standards, oftentimes less transparent than shareholders desire and not uniform so the data cannot be easily aggregated or compared.[37]

In sum, the existing "procedures of corporate democracy" provide insufficient protections for shareholders with regard to corporate political spending. The basic rules of corporate law were not developed as decisionmaking rules or protections for expressive rights.[38] Furthermore, the reality is unfortunately even worse than the above description suggests because of information problems and the fact that in the twenty-first century most Americans hold stock indirectly through institutional investors.

Corporations are not required under current law to disclose the full scope of their corporate political spending.[39] The information about corporate political spending that is in the public domain is incomplete, low quality, scattered across multiple sources, and is not presented in a standard manner.[40] As one scholar has observed, "[t]o obtain information about a company's electoral spending in all elections, one must review disclosure reports on the FEC's website as well as on the websites of election regulators in all fifty states."[41] It is costly and time-consuming for the public, and investors more specifically, to gather this fragmented information and it would still only give a partial picture of the total spending of the corporation that was directed at political activity.

Polls of investors even before *Citizens United* found that a majority of shareholders "'strongly agree[d]' that there was too little transparency in corporate political spending on politics."[42] Only ten companies in the S&P 500 have voluntarily "prohibited the use of corporate assets to influence elections and asked third parties not to use company payments for election-related payments."[43] Researchers have found that many companies that have claimed to have policies against corporate political spending actually engaged in this activity.[44] More than half of the S&P 500

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[37] Bebchuk et al., *Untenable Case*, *supra* note 23, at 26 (listing reasons why private ordering is not sufficient for disclosure of corporate political spending).

[38] Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 643 (2016).

[39] Haan, *supra* note 29, at 303 ("Corporate electoral spending is particularly opaque under existing disclosure law. Corporations are only rarely required by public law to disclose anything about their electoral spending, and virtually all mandatory disclosures of corporate electoral spending are made not by the corporations themselves, but by the recipients of corporations' funds, such as 'Super PACs.'").

[40] Bebchuk & Jackson, *Shining Light*, *supra* note 20, at 935, 947-48.

[41] Haan, *supra* note 29, at 304.

[42] *Id.* at 940 (quoting Mason-Dixon Polling & Research, Corporate Political Spending: A Survey of American Shareholders 6 (2006)).

[43] Center for Political Accountability, *The 2018 CPA-Zicklin Index of Corporate Political Disclosure and Accountability* 13 (2018), https://politicalaccountability.net/index [2018 CPA-Zicklin Index].

[44] Heidi Welsh & Robin Young, *Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies*, IRRC INST. 26-27 (Nov. 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959566 ("Out of the 57 companies that have policies apparently prohibiting political spending, only 23 companies actually did not give money to political committees, parties or candidates. . ."); *The Myth of Corporate Disclosure Exposed*, CITIZENS FOR RESP. ETHICS WASH. (2014), at 1, https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/07/20022722/4_15_2014_Myth_of_Corporate_Disclosure_Exposed_The_Problem_with_Political_Spending_Reports_CREW.pdf ("The report shows companies frequently are failing to disclose what they say they will.").

discloses some or all election-related spending on a voluntary basis, but these disclosures may be incomplete and exclude spending to intermediaries.[45]

Most notably, political spending increasingly has gone "underground"—directed to groups that act as intermediaries for political activity.[46] One study found that independent expenditures increased after *Citizens United* and the increase was twice as large in states that had previously banned corporate independent expenditures.[47] The increase in spending has largely been driven by 501(c) nonprofits, which are not required to disclose their donors, and 527 political committees, which are often opaque as in many states it requires a formal public records request to find donor information.[48] The lack of quality data means that potential investors, shareholders, and other stakeholders cannot make informed decisions on this issue and researchers cannot measure the full amount and type of corporate spending.[49]

Changes in U.S. stockholding patterns and demographics suggest that more Americans are affected by this problem than in the past and the dynamic for accountability through the "procedures of corporate democracy" are even less likely to occur and succeed.[50] In the early 1980s, less than one-fifth of American households owned stock.[51] Today, nearly half of American households own stock—a dramatic increase that has brought increasing diversity to shareholders as a group.[52] Shareholders are heterogeneous across demographic categories and almost certainly vary in their political beliefs and preferences.

Moreover, the vast bulk of U.S. stock ownership is held indirectly through mutual funds, 401(k) accounts or other pension or retirement plans. In 2018, about 44% of U.S. households owned

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45 2018 CPA-Zicklin Index, *supra* note 43, at 13.

46 Spencer & Wood, *supra* note 12, at 318. This may include, for example, 501(c)(4) "social welfare" groups, 501(c)(6) nonprofit trade associations, shell corporations, and 527 political committees. *See id.*; David Earley & Ian Vandewalker, *Transparency for Corporate Political Spending: A Federal Solution* 3-4, Brennan Center for Justice (Aug. 1, 2012), https://www.brennancenter.org/publication/transparency-corporate-political-spending-federal-solution.

47 Spencer & Wood, *supra* note 12, at 347.

48 *Id.;* Money in Politics 101: What You Need to Know About Campaign Finance After Citizens United, BRENNAN CENTER FOR JUSTICE (Sept. 28, 2012), https://www.brennancenter.org/analysis/money-politics-101-what-you-need-know-about-campaign-finance-after-citizens-united ("[I]t is reasonable to suspect that, because of non-profits' ability to hide donations, they are the preferred vehicle for corporate political spending.").

49 *See* Spencer & Wood, *supra* note 12, at 357 (noting research gaps and challenges); Abby K. Wood, *Campaign Finance Disclosure*, 14 ANNUAL REV. L. & SOC. SCI. 11, 24 (2018) ("Scholars of campaign finance disclosure must understand how gaps in the regulations for mandatory disclosure and online political advertising can bias our observational work and reduce the generalizability of our empirical findings.").

50 Pollman, *Citizens Not United*, *supra* note 24; *see also* Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market*, 35 SEATTLE U. L. REV. 1299, 1352 (2012) ("The conundrum of investors potentially forced to choose between economic returns and fidelity to political ideology demonstrates the comingling of economic interests with social and political concerns as democratic participants.").

51 James M. Poterba & Andrew A. Samwick, *Stock Ownership Patterns, Stock Market Fluctuations, and Consumption*, 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 295, 321 (1995).

52 Although nearly half of American households own stock, it is not equally distributed—84% of all stocks owned by American belong to the wealthiest 10% of households. Patricia Cohen, *We All Have a Stake in the Stock Market, Right? Guess Again*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/2018/02/08/business/economy/stocks-economy.html.

mutual funds—about 100 million Americans representing all age and income groups.[53] This indirect form of stockholding heightens the concern that the ultimate beneficiaries lack information about the political spending of corporations in which their money is invested and are unable to vote their stock or sell the stock of a particular corporation if they disapprove of its political spending. Even more generally, individuals invested in retirement and college funds often cannot exit their investment without significant penalty.[54] Furthermore, the largest mutual funds have been inactive in using the "procedures of corporate democracy" discussed above such as shareholder litigation, proxy fights, and other activism.[55] The upshot is that most Americans have invested indirectly through institutional investors and their capital is effectively stuck in this system without accountability on the issue of corporate political spending.

II. A Decade of Proposals and A Path Forward

With the problem now at hand, we can turn to possible paths forward for reform. Representatives and senators have introduced a number of bills in Congress, academics have published policy proposals and submitted rulemaking petitions to the SEC, and grassroots movements have fought to overturn *Citizens United*. Notable proposals include the following:

Congressional bills:

- **DISCLOSE Act of 2010 (H.R. 5175, S.3628), 2012 (S.2219, S.3369), 2014 (S.2516), 2015 (S.229), 2017-2018 (S.1585, H.R.6239)**: Among other requirements of the various iterations, would amend the Federal Election Campaign Act of 1971 to require corporations and other groups to report within 24 hours of making an independent expenditure or electioneering communication of $10,000 or more.[56]

- **Shareholder Protection Act of 2010 (H.R. 4790), 2019 (S.1630)**: Requires shareholder approval of an annual political expenditure budget (majority of outstanding shares), board

[53] INV. CO. INST., 2019 INVESTMENT COMPANY FACT BOOK, 2019, at 134, *available at* https://www.ici.org/pdf/2019_factbook.pdf.

[54] Pollman, *Citizens Not United*, *supra* note 24; Strine, *Fiduciary Blind Spot*, *supra* note 23, at 20 ("Worker Investors typically do not get to pick and choose stocks in their 401(k), they get to choose among mutual funds, often within specific fund families.").

[55] Strine, *Fiduciary Blind Spot*, *supra* note 23, at 20, 31 ("We therefore have a problem that Worker Investors are at the mercy of one group of agents with conflicts of interest, institutional investors, to check another group of agents with conflicts of interest, public company management, as to an issue over which neither class of agent has legitimacy."). In theory, public pension funds might be positioned to work toward private ordering solutions, but fund managers are fiduciaries acting on behalf of their beneficiaries and, absent legal change, may be constrained from furthering interests understood as non-economic. Haan, *supra* note 29, at 311; Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, forthcoming STAN. L. REV., https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3244665.

[56] H.R. 5157, 111th Congress (2009-2010). Introduced in 2010 the House by Rep. Chris Van Hollen (D-MD), https://www.congress.gov/bill/111th-congress/house-bill/5175, in the Senate by Sen. Charles Schumer (D-NY). Re-introduced in 2012 by Sen. Sheldon Whitehouse (D-RI), https://www.congress.gov/bill/112th-congress/senate-bill/2219, in 2014, 2015, and in 2017, and in 2018 by Rep. David Cicilline (D-RI), https://www.congress.gov/bill/115th-congress/house-bill/6239/text?q=%7B%22search%22%3A%5B%22DISCLOSE+Act+of+2018%22%5D%7D&r=2.

approval of political expenditures over $50,000, and disclosure of the spending and recipients.[57]

- **Accountable Capitalism Act (S.3348)**: Among other requirements, the bill mandates U.S. corporations with more than $1 billion in annual revenue to obtain the approval of "not less than 75 percent of the shareholders of the corporation and not less than 75 percent of the directors of the corporation" before making a political expenditure or series of expenditures totaling more than $10,000 for any single candidate during any single election.[58]

- **Corporate Political Disclosure Act of 2019 (H.R. 1053)**: Would amend the Securities Exchange Act of 1934 to direct the SEC to require public corporations to disclose in their annual report "a summary of expenditures for political activities made during the preceding year," which would include independent expenditures, electioneering communications, and dues or other payments to trade associations or other 501(c) organizations that could reasonably be anticipated to be used or transferred for political use.[59]

Academic proposals, rulemaking petitions, and other notable proposals and initiatives:

- **Disclosure & Broader "Democracy Agenda" / Brennan Center for Justice at NYU School of Law**: Various researchers, academics, and lawyers associated with the Brennan Center have offered proposals ranging from SEC-mandated disclosure to a broader "Democracy Agenda" that, for example, proposes the nomination of "justices who understand that the First Amendment should serve as a tool to improve democracy, not a blunt instrument to thwart measured reform."[60]

- **Disclosure / Rulemaking Petition to SEC from the Committee on Disclosure of Corporate Political Spending**: Proposes that the SEC design a mandatory disclosure rule for corporate political spending, set at a "low threshold" with a de minimis exception, rely upon the existing proxy-disclosure regime as the method for providing investors with this information, and delineate the scope of expenditures to address potential problems of over- or

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[57] H.R. 4790, 111th Congress (2010-2011), https://www.govtrack.us/congress/bills/111/hr4790/text (introduced in the House in 2010 by Rep. Michael E. Capuano (D-MA8). This was re-introduced in the Senate (S.1630) in May 2019 as the Shareholder Protection Act of 2019 and included as section 4502 of the For the People Act, https://www.congress.gov/bill/116th-congress/senate-bill/1630?s=1&r=67.

[58] S.3348, 115th Congress (2017-2018), https://www.congress.gov/bill/115th-congress/senate-bill/3348/text (introduced in the Senate in August 2018 by Sen. Elizabeth Warren (D-MA)); https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf (one page summary).

[59] H.R. 1053, 116th Congress (2019-2020), *available at* https://www.congress.gov/bill/116th-congress/house-bill/1053/text?q=%7B%22search%22%3A%5B%22HR+1053%22%5D%7D&r=1&s=1 (introduced in the House in February 2019 by Reps. Salud Carbaja (D-CA 24) and Zoe Lofgren (D-CA 19)).

[60] Earley & Vandewalker, *supra* note 46 (SEC federally-mandated disclosure); *Overturn Citizens United and Restore a Pro-Democracy View of the Constitution*, BRENNAN CENTER FOR JUSTICE (Feb. 4, 2016), https://www.brennancenter.org/analysis/overturn-citizens-united-and-restore-pro-democracy-view-constitution (Democracy Agenda).

under-inclusion.[61] The SEC has received more than 1.2 million comments on the proposal—a record in the history of the agency.[62]

- **Disclosure and Shareholder Protections / Bebchuk & Jackson**: In a series of two articles, Professors Bebchuk and Jackson recommended disclosure and shareholder protections.[63] Their disclosure proposal leaves the analysis to the SEC, providing suggestions regarding the scope of spending and companies covered, spending through intermediaries, de minimis exceptions, frequency and timing.[64] Their shareholder protection proposal would: require shareholder approval of an overall political spending budget in the preceding annual meeting, allow shareholders to adopt binding resolutions concerning corporate political spending, require that independent directors make decisions on corporate speech, and detailed disclosures.[65]

- **Shareholder Protections / John Bogle, former chief executive and chairperson of The Vanguard Group**: Proposes that the SEC take favorable action on the petition for disclosure and allow concerned investors to have an explicit right to submit a resolution that "the corporation shall make no political contributions without the approval of the holders of at least 75% of its shares outstanding."[66] Bogle argued that the "supermajority requirement is necessary because of the inevitably wide range of views that characterize any shareholder base. As it happens, 75 percent is halfway between a simple majority and the standard (under Delaware corporate law) that requires a unanimous shareholder vote to ratify a gift of corporate assets other than for charitable purposes."[67]

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[61] Letter from Comm. on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (Aug. 3, 2011), https://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

[62] Lucian A. Bebchuk & Robert J. Jackson, Jr., *Hindering the S.E.C. From Shining a Light on Political Spending*, N.Y. TIMES (Dec. 21, 2015), https://www.nytimes.com/2015/12/22/business/dealbook/hindering-the-sec-from-shining-a-light-on-political-spending.html. The comments were largely supportive of the rulemaking petition and criticisms were addressed in Bebchuk et al., *Untenable Case*, *supra* note 23.

[63] Bebchuk & Jackson, *Shining Light*, *supra* note 20 (disclosure); Bebchuk & Jackson, *Who Decides?*, *supra* note 19 (shareholder protection).

[64] The academic paper on disclosure was foundational to the Rulemaking Petition to SEC. Other scholars have made similar proposals or offered analysis supporting corporate political spending disclosure. *See* Haan, *supra* note 29, at 338-44 (arguing for the SEC to mandate corporate political spending disclosure); Ciara Torres-Spelliscy, Kathy Fogel & Rwan El-Khatib, *Running the D.C. Circuit Gauntlet on Cost-Benefit Analysis After* Citizens United: *Empirical Evidence From Sarbanes-Oxley and the JOBS Act*, 9 DUKE J. CONST. L. & PUB. POL'Y 135 (2014) (supporting SEC mandated disclosure rule and providing data on market reaction to SOX and the JOBS Act as evidence of perceived benefits of transparency); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1736-38 (2015) (explaining how the rationale for corporate speech rights based on the interests of listeners supports disclosure).

[65] Professors Bebchuk and Jackson were preceded by other scholars such as Victor Brudney who suggested shareholder approval as a potential solution to the governance problems associated with corporate political spending. Brudney explored a range of possible consent thresholds from majority to unanimity to protect dissenting shareholders. *See* Brudney, *supra*, note 21, at 255-74. Scholars continue to support shareholder approval or state corporate law responses such as heightened judicial scrutiny or private ordering through bylaw amendments. *See, e.g.*, James Kwak, *Corporate Law Constraints on Political Spending*, 18 N.C. BANKING INST. 251 (2013); Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161 (2016).

[66] Letter from John C. Bogle, Comment on Comm. on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (Aug. 3, 2011), https://www.sec.gov/comments/4-637/4637-22.pdf.

[67] John C. Bogle, *The Supreme Court Had Its Say. Now Let Shareholders Decide*, N.Y. TIMES (May 14, 2011), https://www.nytimes.com/2011/05/15/opinion/15bogle.html.

- **Shareholder Opt-Out Rights / Sachs**: Proposes that shareholders in public corporations be given an opt-out right similar to union members.[68] Basic terms would include that "shareholders would gain the right to object to the corporation's use of their pro rata share of corporate assets for political purposes."[69] Each corporation would "determine what percentage of its overall annual expenditures are political ones" and "[e]ach objecting shareholder would then be entitled to an annual dividend equal to their pro rata share of these political expenditures."[70]

- **Constitutional amendment / Various advocacy groups, academics, and others:** Nationwide initiative to amend the Constitution to facilitate campaign finance regulation.[71] Advocacy groups mobilized shortly after *Citizens United* and various efforts have continued to explore the possibility of constitutional amendment, including a recent Constitution Day 2019 open letter of notable jurists, academics, lawyers, and former government officials and policymakers.[72]

The bold proposal for constitutional amendment aims at far greater reform than corporate governance, and thus can be set to the side for the purposes of this paper, but it serves as a reminder that any government-mandated rule must fit within constitutional constraints, as interpreted by the Supreme Court. A rule that concerns the corporation's decisionmaking process about political spending might be characterized as a simple matter of corporate law or governance – however, because it implicates corporate political speech it could be subject to heightened judicial scrutiny under the First Amendment.[73] In *Citizens United*, the Supreme Court seemed to accept the legitimacy of the government's interest in protecting dissenting shareholders, but ruled that it could not justify a "ban" on corporate speech prior to elections that was both under- and over-inclusive.[74] The Court suggested that "the remedy is not to restrict speech but to consider and explore other regulatory mechanisms."[75] In doing so, it is therefore important to consider and ensure that any proposal that is adopted be within constitutionally permissible boundaries.

[68] Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights after* Citizens United, 112 COLUM. L. REV. 800, 862-65 (2012).

[69] *Id.* at 864.

[70] *Id.*

[71] *See* Susanna Kim Ripken, *Corporate First Amendment Rights After* Citizens United: *An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209 (2011) (describing the Move to Amend campaign and grassroot movements to amend the Constitution regarding corporate rights).

[72] Constitution Day 2019 Statement of Principles, AMERICAN PROMISE (Sept. 17, 2019), https://www.americanpromise.net/2019-constitution-day-statement-of-principle/ (notable signatories include Trevor Potter, James Nelson, Laurence Tribe, Lawrence Lessig, Zephyr Teachout, and Adam Winkler).

[73] *See* Ribstein, *supra* note 23, at 1027, 1031 ("Regulation specifically restricting speech by for-profit corporations may be considered viewpoint discriminatory and subject to a higher level of First Amendment scrutiny. . . . The same conclusion might hold even though the regulation deals only with the procedures for authorizing corporate speech rather than prohibiting speech itself, because the regulation effectively restricts the speech by making it more costly. . . . . [R]easonable corporate governance regulation that does not unduly restrict corporate speech may pass muster."). Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1, 70-71 (1995) ("If a broader restraint is to be considered—e.g., a proscription of corporate advocacy speech or a requirement of stockholder consent for such speech—the question is whether the restraint is sufficiently narrow to be constitutionally tolerable.").

[74] *Citizens United*, 558 U.S. at 361-62.

[75] *Id.* at 362.

Surveying the wide-ranging proposals above, one finds three essential types of proposals aimed specifically at governance problems associated with corporate political spending: disclosure, shareholder approval, and shareholder opt-out rights. This paper endorses an approach that includes the first two of these three, for reasons discussed below.

A. Disclosure Proposal

As a threshold matter, without mandatory disclosure, shareholders cannot become informed and monitor the corporations in which they are invested. The Supreme Court itself assumed disclosure mechanisms would exist such that shareholders could use the "procedures of corporate democracy" to alleviate any concerns about abuse or forced association. The discussion above highlights the limited promise of private ordering after a decade of efforts in which investors have shown strong interest in information about corporate political spending. Even Justice Anthony Kennedy, who authored the majority opinion in *Citizens United*, observed just a few years later that disclosure is "not working the way it should."[76]

This paper therefore supports proposals that have called on the SEC to mandate public companies to disclose political spending.[77] As others have observed, this rule-making fits within the authority and purview of the SEC, the agency charged with creating rules in the public interest that protect investors and promote efficiency, competition, and capital formation.[78] The Securities Exchange Act of 1934 § 14 authorizes the SEC to require proxy disclosure "as necessary or appropriate in the public interest or for the protection of investors."[79] Indeed, the SEC's existing rules and guidance are already the framework within which shareholders have attempted to find private ordering solutions.[80] Although legislation such as the DISCLOSE Act could functionally achieve similar disclosure of corporate political spending, the SEC has a long history of regulating the disclosure of information in a useful and efficient manner for investors.

There should be no question that SEC-mandated disclosure of corporate political spending would be constitutionally permissible. By an 8-1 vote, the Court in *Citizens United* upheld the constitutionality of mandatory disclosure and disclaimer provisions.[81] The Court observed that

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76 Marcia Coyle, *Justice Anthony Kennedy Loathes the Term "Swing Vote*, NAT'L L.J. ONLINE (Oct. 27, 2015), https://www.law.com/nationallawjournal/almID/1202740827841/Justice-Anthony-Kennedy-Loathes-the-Term-Swing-Vote/#ixzz3qFweJDh2.

77 As a related matter, proceeding on this proposal requires Congress to refrain from its recent practice of passing omnibus legislation that has precluded the SEC from engaging in the rule-making process regarding political spending disclosure. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 707, 129 Stat. 2242, 3029-3030 (2015) ("[n]one of the funds made available by any division of this Act shall be used by the Securities and Exchange Commission to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations"); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 635, 131 Stat. 135, 376 (2017). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 631, 132 Stat. 348, 584 (2018).

78 15 U.S.C. 78c(f) (2012).

79 Securities Exchange Act of 1934, §14(a); 15 U.S.C § 78(n) (2012).

80 Haan, *supra* note 29, at 341 ("[T]he SEC's existing rules *already* provide the governing framework within which the private ordering of corporate campaign finance disclosure plays out.").

81 *Citizens United*, 558 U.S. at 367-69. The Court left open the possibility that disclosure could excessively burden the First Amendment in particular situations, such as where a significant threat of harassment or retaliation poses danger to individuals, but anonymity values have little purchase in the context of public corporations. *See, e.g.*, Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in*

disclosure actually promotes First Amendment values: "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way: This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[82]

The Rulemaking Petition submitted to the SEC in 2011, discussed above, strikes the correct approach of laying out the basic contours of scope, threshold, frequency, and timing, while recognizing that the SEC has expertise to balance the cost of disclosure. Furthermore, there will be opportunity for fine tuning once an initial rule is in place and better information is available to understand the full amount of corporate political spending and the frequency and ways that it is carried out. This paper adds two points of emphasis—(1) research suggests that a significant amount of corporate political spending may be occurring through intermediaries and thus for the disclosure rule to work as intended, it is critically important that this spending be captured within the scope of the rule; and (2) the threshold for disclosure should be set relatively low as otherwise it can be easily evaded and shareholders may care about spending for expressive reasons that do not depend on a large dollar amount.[83]

B. Shareholder Approval and Resolution Proposal

The other two types of proposals—shareholder approval and opt-out rights—go further toward solving the problem of dissenting shareholders. Disclosure is a necessary first measure to shine light on the situation and increase the likelihood of accountability in circumstances where there is a misalignment between corporate managers and shareholders. But disclosure alone is likely not sufficient because many dissenting shareholders would still have little, if any, meaningful means of exiting or participating in procedures of corporate democracy.

Shareholder opt-out rights are narrowly tailored to solving the dissenting shareholder problem, but the administrative burden is likely impracticably high for public corporations. These corporations have large numbers of shareholders which change frequently with public trading and include institutional investors that would add a layer of logistical complexity. Given that the *Citizens United* Court viewed PACs as imposing too costly a burden, it seems a rule that would restrict political spending to corporations that implement a system of opt-out rights might not pass constitutional muster. The idea might also draw criticism for reflecting a flawed analogy between public corporations and unions—both might involve dissenters and their expressive interests, but

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the Wake of Citizens United, 120 YALE L.J. 622, 658-63 (2010) (arguing that "anonymity values ought not weigh against disclosure requirements for corporate speech as they do individual speech" because there is little danger of chilling or retaliation, the inherent public nature of corporations, and shareholders' need for the information).

[82] *Citizens United*, 558 U.S. at 371; *see also* Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J. L. & POL. 683, 688-89 (2012) ("*Citizens United* enhanced the constitutionally protected status of disclosure by sharply contrasting the benefits of disclosure against the constitutional problems the Court has concluded are posed by restrictions on campaign money.").

[83] *See* Spencer & Wood, *supra* note 12, at 353. Researchers explain: "[L]arge spenders may be making one large expenditure or they may make several smaller expenditures. For example, suppose that Google wants to spend $1 million to support conservative candidates. After *Citizens United*, it can either make expenditures from its general treasury, which we could track, or it could give money to several other politically active groups, many of which would not disclose Google's donation. Because we do not now the source of funds for the 501(c) and 527 organizations in our sample, we cannot distinguish between a world where Google gives its entire $1 million to a single organization and a world where Google gives $10,000 to each of 100 groups." *Id.*

unions are more associational in nature and involve dues which more readily translate to a concept of opting out than do shares of equity, particularly when held indirectly through funds.[84]

Shareholder approval is a more promising path. It would be significantly less burdensome than opt-out rights and could be done through the already existing proxy machinery on an annual basis (or bi- or tri-annual basis). As a point of comparison, the U.K. Companies Act was amended in 2000 to require British companies to seek majority consent from shareholders to any political spending that exceeds £5,000 and to report such spending to shareholders on an annual basis.[85] Although research is incomplete, it suggests that corporate political spending declined after this rule was adopted but it has not acted as a corporate ban and companies still participate in political spending after obtaining shareholder approval for the budget in advance.[86] This method notably does not have shareholders vote on the specific use or recipient of the expenditure, and thus will not fully resolve all dissenting shareholder issues, but it is an improvement from existing practice because it involves shareholders in the decision whether to engage in corporate political spending, providing a measure of voice and accountability. Both expenditures that are made directly for political advocacy and indirectly through intermediaries should be included.

Proposals have varied regarding the level of shareholder approval required—majority consent, majority of the shares outstanding, 75% of the shareholders, or 75% of the shares outstanding. The higher the threshold, the fewer dissenting shareholders would be forced to associate with speech they disapprove of, however courts will weigh protection of shareholder expression against frustrating corporate speech generally.[87] For this reason, a prudent default would be majority consent, similar to other shareholder protections and mechanisms for shareholder voice on proxy matters.

In addition, the Bebchuk and Jackson proposal includes a provision that would also allow shareholders to adopt binding resolutions concerning corporate political spending and this paper endorses that approach to supplement the default requirement of shareholder approval.[88] Such a rule

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[84] For an argument against treating corporations like unions with respect to dissenters' opt-out rights, see James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969 (2016). Some critics might assert that shareholders do not have associational or expressive interests in the corporation to protect, particularly in public corporations given the indirect stockholding of many investors. To the extent this argument has force, it suggests that the Supreme Court's decision in *Citizens United* should be re-examined as it characterized corporations as "associations of citizens" in granting them First Amendment protections—but this should not be used as a reason to deny all efforts at creating "regulatory mechanisms."

[85] Companies Act, 2006, c. 7, 366 (U.K.).

[86] Ciara Torres-Spellicy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U.S.F. L. REV. 525, 527-53 (2012); Ciara Torres-Spellicy, *Corporate Campaign Spending: Giving Shareholders A Voice*, BRENNAN CENTER FOR JUSTICE (January 27, 2010), https://www.brennancenter.org/publication/corporate-campaign-spending-giving-shareholders-voice.

[87] Ribstein, *supra* note 23, at 1043-44.

[88] Bebchuk & Jackson, *Who Decides?*, *supra* note 19, at 99. Bebchuk and Jackson additionally propose mandating independent-director oversight of corporate political spending. They contrast their proposal on this point with the DISCLOSE Act which would have required the chief executive officer or a designee to certify the accuracy of the disclosure. *See id.* at 102. Either practice would theoretically add a measure of accountability or process. Board oversight of corporate political spending is a governance practice already encouraged by various notable organizations such as the Business Roundtable, an association of chief executive officers, and the CPA-Zicklin Index, which is a collaboration between the Center for Political Accountability, a non-partisan, non-profit advocacy

would help to ameliorate concern about harm to shareholder expression given that it would allow for customization beyond the basic approval of an aggregate budget. Shareholders could decide that corporations must follow certain principles in allocating an authorized budget, raise the threshold needed for shareholder approval, or even opt out of the default requiring shareholder consent and therefore mitigate the impact on corporate speech.[89]

Conclusion

The above discussion has examined the corporate governance and dissenting shareholder problems associated with corporate political spending and has endorsed a two-part proposal for reform.

First, the SEC should mandate that public corporations disclose political spending, including expenditures made through intermediaries. Strong investor support exists for this rule and the *Citizens United* opinion assumed that disclosure would function to timely provide shareholders with this information. In its rulemaking process, the SEC can determine the appropriate scope, de minimis exceptions, frequency, and timing of disclosure. This paper emphasizes two points in that regard. In light of political spending increasingly going "underground" to intermediaries that do not disclose their donors, it is critical that the disclosure rule capture not only direct spending but also indirect spending to intermediaries that engage in significant political spending and advocacy. Further, although de minimis exceptions are sensible in light of the need to balance the cost of disclosure, such a threshold should be aimed relatively low to avoid evasion that could occur through chunking out spending and because shareholder expressive interests may not correspond to dollar size.

Second, Congress should enact legislation requiring public corporations to obtain shareholder approval for corporate political spending and allowing for binding shareholder resolutions on this subject matter. Disclosure is an important first step, but it is not a sufficient solution for dissenting shareholders. *Citizens United* assumed shareholders could use "the procedures of corporate democracy" to have voice in the corporation and hold corporate directors and officers accountable. Shareholder approval on a proposed budget for corporate political spending builds in a "regulatory mechanism" to enable expression of voice on this issue. A majority vote is a prudent threshold to balance the interests of ameliorating harm to dissenting shareholders while not unconstitutionally restricting speech. Further, allowing for binding shareholder resolutions provides means for customization by shareholder private ordering—whether that be to raise the vote level required for shareholder approval, to opt out of the default requirement, or to put in place specifications regarding how corporate political spending can be allocated.

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organization, and the Zicklin Center for Business Ethics Research at The Wharton School, University of Pennsylvania.

[89] *Id.*; *see also* Ribstein, *supra* note 23, at 1043 (explaining that the ability to opt out of the default rule requiring shareholder consent would mitigate concerns about restricting speech).